Seni Jaya Sdn Bhd & Anor v Dato' Hj Ahmad Tarmizi bin Hj Puteh & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(f)-29–09 OF 2016(B)
AHMAD MAAROP PCA, DAVID WONG (CJ SABAH AND SARAWAK), ZAINUN ALI, BALIA YUSOF AND ZAWAWI SALLEH FCJJ
21 NOVEMBER 2018

Contract — Formation — Whether there was a contract — Whether appellants could rely on qualified and conditional letter from a local authority to contend they had a concluded contract with it — Whether there was no absolute and unqualified acceptance of appellants' proposal — Whether proposal contained too many onerous and complex terms and conditions that it went against commercial sense to say offeree unconditionally accepted them in entirety — Whether appellants failed to show existence of a binding concluded contract

The appellants sued the respondents in the High Court for breach of an alleged agreement to privatise exclusively to them for a period of 15–20 years, the right to manage all outdoor advertising sites ('billboards') in the city of Petaling Jaya ('PJ') through the agency of the second respondent's sports club ('the sports club'). The second respondent ('R2') was the local authority for PJ while the first respondent ('R1') was its president at the material time. R2 initially decided to raise funds for the sports club by giving it the sole right to manage the billboards so that revenue from billboard licensing fees and other payments from advertisers could be received by the club. However, when that move did not work, R2 called for tenders to privatise the management of the billboards. One of the parties who submitted tenders was the appellants who contended that by a letter dated 16 December 2005 ('the 16 December 2005 letter') R1, on R2's behalf, agreed in principle to give the appellants the right to exclusively manage and operate the billboards in several areas under R2's jurisdiction ('the concession'). The appellants claimed that on the strength of that letter they paid RM2.1m to the sports club. Contending that they had a concluded agreement with R2 with regard to the concession, the appellants sought specific performance of the agreement or damages in lieu thereof. The High Court dismissed the appellants' suit after finding that there was no concluded contract between them and R2 and that the sports club could not in law act as an agent for the licensing functions of R2. The Court of Appeal affirmed the High Court's decision resulting in the instant appeal.

Held, dismissing the appeal:

(1) Although the words 'agreed in principle' were used in the 16 December 2005 letter, they had to be considered in the context of the entire letter. The proposal made by the appellants was not short in details and it was glaring in R2's response that there was no reference to any of the terms the appellants had proposed. In fact, R2 stated in no uncertain terms that important terms and conditions had to be discussed. There was no absolute and unqualified acceptance of the appellants' proposal but, at best, a qualified or conditional acceptance which in law was effectively a rejection (see para 26).

(2) There was no merit to the contention that despite the lack of a formal executed agreement, the factual matrix gave rise to a binding contract. The proposal by the appellants envisaged a 15–20 years' monopoly over the management of the advertising sites and contained onerous and complex terms and conditions which no reasonable enterprise would agree to unless and until their full ramifications were known. The contention that R2 had agreed to all the terms was not only bereft of any evidence but bereft of any commercial sense. The first appellant's letter dated 26 May 2006 protesting against R2's failure to reply to the proposed changes further showed the absence of any concluded contract (see paras 27–31).

(3) The appellants' payment of RM2.1m to the sports club was a matter between them and the sports club as there was no evidence to link that payment to an alleged concluded contract between the appellants and R2. If that payment was part of the consideration for the proposed agreement, surely mention should have been made of that fact in the proposed agreement itself. The appellants had also made the fatal risk of not naming the sports club as a party to the suit to advance their contention that the sports club was R2's agent (see para 32).

[Bahasa Malaysia summary

Perayu-perayu menyaman responden-responden di Mahkamah Tinggi kerana melanggar perjanjian yang dikatakan untuk menswastakan secara eksklusif kepada mereka untuk tempoh 15–20 tahun, hak untuk menguruskan semua tapak iklan luar ('papan iklan') di bandar Petaling Jaya ('PJ') menerusi agensi kelab sukan responden kedua ('kelab sukan'). Responden kedua ('R2') adalah pihak berkuasa tempatan untuk PJ manakala responden pertama ('R1') adalah presiden pada masa yang material. R2 pada mulanya membuat keputusan untuk mengumpul dana untuk kelab sukan dengan memberi hak tunggal untuk menguruskan papan iklan supaya pendapatan daripada bayaran pelesenan papan iklan dan bayaran lain dari pengiklan dapat diterima oleh kelab. Walau bagaimanapun, apabila langkah itu tidak berjaya, R2 meminta tender untuk menswastakan pengurusan papan iklan. Salah satu pihak yang mengemukakan tender ialah perayu yang menegaskan bahawa dengan surat bertarikh 16 Disember 2005 ('surat 16 Disember 2005') R1, atas nama R2,

telah bersetuju dengan prinsip untuk memberi hak kepada perayu untuk secara eksklusif mengurus dan mengendalikan papan iklan dalam beberapa bidang di bawah bidangkuasa R2 ('konsesi'). Perayu mendakwa bahawa dengan kekuatan surat tersebut mereka membayar RM2.1 juta kepada kelab sukan. Dakwaan bahawa mereka telah membuat perjanjian dengan R2 berkaitan dengan konsesi, perayu memohon perlaksanaan spesifik perjanjian atau ganti rugi sebagai ganti. Mahkamah Tinggi menolak saman perayu setelah mendapati bahawa tidak ada kontrak yang disimpulkan antara mereka dan R2 dan bahawa kelab sukan itu tidak boleh bertindak dalam undang-undang sebagai agen untuk fungsi pelesenan R2. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi yang mengakibatkan rayuan ini.

Diputuskan, menolak rayuan:

(1) Walaupun perkataan 'agreed in principle' digunakan dalam surat 16 Disember 2005, mereka perlu dipertimbangkan dalam konteks seluruh surat. Cadangan yang dibuat oleh perayu bukanlah perincian ringkas dan ia merujuk kepada respons R2 bahawa tidak ada rujukan terhadap mana-mana terma yang dicadangkan oleh perayu. Malah, R2 menyatakan dengan jelas bahawa terma dan syarat penting perlu dibincangkan. Tidak ada persetujuan mutlak dan tanpa syarat bagi cadangan perayu tetapi, begitu juga, persetujuan terbatas atau bersyarat yang secara undang-undang adalah penolakan (lihat perenggan 26).

(2) Tiada merit kepada pandangan walaupun kekurangan perjanjian yang dilaksanakan secara rasmi, matriks faktual menimbulkan kontrak mengikat. Cadangan oleh perayu menjangka monopoli 15–20 tahun di atas pengurusan tapak pengiklanan dan mengandungi terma dan syarat yang sukar dan kompleks yang mana tiada perusahaan yang munasabah akan bersetuju kecuali dan sehingga akibat penuh mereka diketahui. Pandangan bahawa R2 telah bersetuju dengan semua syarat bukan sahaja tidak mempunyai apa-apa keterangan tetapi tidak mempunyai sebarang makna komersial. Surat perayu pertama bertarikh 26 Mei 2006 memprotes terhadap kegagalan R2 untuk membalas perubahan yang dicadangkan selanjutnya menunjukkan ketiadaan apa-apa kontrak akhir (lihat perenggan 27–31).

(3) Pembayaran perayu sebanyak RM2.1 juta kepada kelab sukan itu adalah perkara di antara mereka dan kelab sukan kerana tiada bukti untuk menghubungkan pembayaran tersebut dengan kontrak akhir didakwa antara perayu dan R2. Sekiranya pembayaran itu adalah sebahagian daripada pertimbangan untuk perjanjian yang dicadangkan, pastinya sebutan harus dibuat dari fakta itu dalam perjanjian yang dicadangkan itu sendiri. Perayu juga telah membuat risiko maut apabila tidak menamakan kelab sukan itu sebagai pihak dalam saman untuk

memulakan pandangan mereka bahawa kelab sukan itu adalah ejen R2 (lihat perenggan 32).]

Notes

For a case on whether there was a contract, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 5577.

Cases referred to

Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd [1994] 2 MLJ 754; [1994] 3 CLJ 133, SC (folld)

Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor [2015] 6 MLJ 310; [2015] 8 CLJ 1068, FC (folld)

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 MLJ 257; [2003] 3 CLJ 349, FC (refd)

Legislation referred to

Contracts Act 1950 s 7(a)
Courts of Judicature Act 1964 ss 78(1), 96(a)
Local Government Act 1976 s 36(1)
National Land Code ss 65, 66, 67
Societies Act 1966

Muhammad Shafee Abdullah (Sarah Abishegam and Wee Yeong Kang with him) for the first and second appellants.

Cyrus V Das (Kamaruzaman M Arif and Sofiah Omar with him) (Kamaruzaman Arif, Amran & Chong) for the second respondent.

David Wong CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal from the judgment of the Court of Appeal which had confirmed the decision of the High Court. The appellants were the plaintiffs in the High Court and had sued the respondents/defendants for breach of an alleged agreement to privatise to them the exclusive right to manage and operate all the outdoor advertising sites in the city of Petaling Jaya through the agency of the MPPJ Sports Club.

[2] The appellants had applied for leave to appeal to the Federal Court pursuant to s 96(a) of the Courts of Judicature Act 1964 and on 30 August 2016, this court granted leave to appeal on three questions of law.

[3] We had heard the appeal and reserved judgment for deliberation. We have since given further due consideration to the submissions of respective

counsel and now give our decision and grounds.

[4] This judgment is prepared pursuant to s 78(1) of the Courts of Judicature Act 1964, as our learned sister, Justice Zainun Ali has since retired.

LEAVE QUESTIONS

[5] This court allowed the following questions of law:

(a) whether the agreement between the second respondent (an arm of the state authority) and the first applicant was entered into 'ultra vires' and/or in breach of the statutory provisions under s 65–67 of the NLC where TOL (temporary occupation licences) under the licensing of the state authority were not obtained for the purposes of the advertising billboards or where such non-compliance makes the agreement merely voidable?

(b) whether the sports club can in law be an agent of the second respondent within the meaning and purport of s 36(1) of the Local Government Act 1976 when it has been specifically authorised to receive the benefits of the payments by the applicants by the second respondent itself? and

(c) if the answer to the above is in the affirmative, whether the RM2.1m paid by the first applicant can be legally construed as 'payment made' to the second respondent by the first applicant under the statute?

BACKGROUND FACTS

[6] The appellants are private limited companies who engages in a business as media operators with outdoor billboard advertisements as one of their main operation. The first appellant, prior to the termination by the second respondent, was one of 58 licensed media operators commissioned by the second respondent to operate and manage billboard advertising sites in the city of Petaling Jaya.

[7] The first respondent was the President of Majlis Perbandaran Petaling Jaya (MPPJ), which is the second respondent, being the local authority for the city of Petaling Jaya under the Local Government Act 1976 ('the Act'). As the local authority, the second respondent administer the running of the city of Petaling Jaya. The second respondent is now known as the Majlis Bandaraya Petaling Jaya (MBPJ).

[8] In 2003, the sports club, which was a registered society under the Societies Act 1966 and operated under the auspices of the second respondent, was given the sole right and license to manage the billboard sites. The purpose of the aforesaid right is to provide a mechanism for the sports club to raise funds so that it could carry its activities.

[9] With the acquired sole right to manage the advertising sites, the sports club entered into written agreements with the respective media operators whereby the relevant billboard licensed fees of the second respondent would be paid to the second respondent on behalf of the sports club with an additional amount to be paid to the sports club. The aforesaid payments are the consideration payable by the licensed media operators for their rights to use the advertisement sites. The additional amounts to be paid to the sports club was the product of the mechanism put into place by the second respondent to allow the sports club to generate fund so that it could carry out its activities. It is not disputed that these additional amounts can come in the form of monetary payment or in kind.

[10] The sponsorship amounts for the licensed sites were paid to the sports club account and not paid to the designated local authority fund of the second respondent under the Act.

[11] However, sometime in 2005, the sports club and the second respondent had great difficulty in recovering the consideration due under the sports club agreements due to the fact that the sports club did not have the requisite man power to effectively manage and administer the advertisement sites.

[12] To overcome this collection difficulty, the second respondent in 2005 decided to privatise the billboard advertisement scheme and in doing so, the second respondent called for tenders. The appellants were one of the three tenderers in the privatisation exercise. It is from this privatisation exercise that the legal suit of the appellants stems from. The appellants fashioned their claims in the re-amended statement of claim as follows:

> 11. In late 2005, the 1st Defendant on behalf of MPPJ as part of a privatization scheme invited 3 Licenced Media Operators, consisting of Seni Jaya, Big Tree Sdn Bhd and one Kurnia Outdoor Media Sdn Bhd ('Kurnia Media') to submit tenders to provide integrated management services in respect of all the MPPJ Sites. The MPPJ Sites consisted of the following:
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> (i) 172 specified MPPJ Sites in Petaling Jaya identified by MPPJ itself ('Package A Sites'); and
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> (ii) all other MPPJ Sites then existing in Petaling Jaya excluding the Package A Sites ('Package B Sites').
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> 12. The company whose tender was accepted would:
>
> (i) manage and/or administer the MPPJ Sites;
>
> (ii) fulfil the contractual obligations of the Sports Club to MPPJ and the other Licenced Media Operators under the Sports Club Agreements; and

(iii) collect monies due to the Sports Club and MPPJ including the Sport Club Payments and MPPJ Billboard Licence Fees, for onward payment to the Sports Club and MPPJ ('Billboard Privatisation Scheme'). A

[13] It is the contention of the appellants that their tender for the billboard privatisation scheme had been successful resulting in an agreement with the second respondent on the following terms as set out in the reamended statement of claim: B

14 At the invitation and on the inducement of the 1st Defendant, Seni Jaya and Orion Mesra jointly submitted a proposal for the Billboard Privatisation Scheme to MPPJ on 14.12.2005 in accordance with the terms as stipulated by the 1st Defendant, for the exclusive management and operation of the Package A and Package B Sites on terms ('Proposed Billboard Privatisation Scheme') which inter alia included the following express conditions: C

(i) the Plaintiffs would be given a concession for the exclusive right to manage and operate the Package A and Package B Sites ('the Concession'); D

(iv) the period of the Concession for both the Package A and Package B Sites as stated in the proposed Billboard Privatisation Scheme shall be for 15 years, with an option to renew for a further 5 years; E

(vii) in consideration of the Package A Sites of the Concession ('Package A Consideration'), the Plaintiffs would pay:

(a) to MPPJ, the MPPJ Billboard Licence Fees on an annual basis for all the Package A sites amounting to RM179,040.00 ('Package A MPPJ Rates'); and F

(b) to the Sports Club:

(i) a 'one off' payment of RM320,000.00 for Package A, payable upon MPPJ's acceptance of the Proposed Billboard Privatisation Scheme ('Package A Initial Payment'); and G

(ii) an annual payment for Package A of RM1,780,000.00 ('Package A Annual Payment') calculated at the rate of RM10,000 per annum for 163 billboard panels and RM30,000.00 per annum for 9 bulletin panels, which together amount to the 172 Package A Sites. The Package A Annual Payment for the first year was to be paid upon MPPJ's acceptance of Seni Jaya's Proposed Billboard Privatisation Scheme. H

[14] The appellants premised their case heavily on the letter dated 16 December 2005 signed by the first respondent. They pleaded as follows: I

In response to the Proposed Billboard Privatisation Scheme of the Plaintiffs, the 1st Defendant on behalf of MPPJ by letter dated 16.12.2005 agreed 'in principle' to give the Concession to the Plaintiffs, to manage and operate the outdoor advertising sites in areas under the control and jurisdiction of MPPJ, save for the sites adjacent

A to the Sprint Highway, Lebuhraya Damansara Puchong, New Klang Valley Expressway and Federal Highway ('the Agreement').

B **[15]** In relying on the aforesaid letter, the appellants made payment on the same day ie 16 December 2005 to the sports club of its entitlement to the one-off payment of RM320,000 and the annual payment of RM1.78m amounting in total to RM2.1m. The effect of these payments according to the appellants is this:

C 16. Acting on the faith and truth of the said representations of, and the Agreement with, the Defendant and being induced thereby, the Plaintiffs by letter of the same date (16.12.2005) to the 1st Defendants accepted the grant by the 2nd Defendants of the Concession. Pursuant to the Agreement reached between the parties, the Package A Initial Payment of RM380,000.00 and Package A Annual Payment of RM1,780,000.00 (collectively referred to as the 'Package A Payment') stipulated in the Proposed Billboard Privatisation Scheme, which amounted to the sum of
D RM2,100,000.00 was paid by the Plaintiffs to the Sports Club on 16.12.2005. The sum of RM2,100,000.00 was received by the Sports Club for and/or on behalf of MPPJ.

E **[16]** Premised on the contention that there has been a concluded agreement between the appellants and the second respondent, they launched this legal suit in 2017 claiming for specific performance of the alleged concession agreement or in the alternative for damages against the second respondent.

F HIGH COURT

[17] After a trial, the High Court dismissed the appellants/plaintiffs' suit holding, inter alia, that the sports club could not lawfully be an agent of the licensing functions of the second respondent and that no contract had come into being with the appellants and that even if there was at all a contract it was
G void for illegality. The first respondent did not enter appearance personally and hence was unrepresented throughout the trial and the appeal.

COURT OF APPEAL

H **[18]** The Court of Appeal affirmed the decision of the High Court on the ground that no binding agreement had been concluded between the appellants and the second respondent.

I OUR GROUNDS OF DECISION

Was there a concluded contract?

[19] It is undisputed between the parties that the first issue which we have to deal with or deliberate on is simply 'whether there was a concluded contract

between the appellants and the second respondent'. The leave questions in our view would only become relevant and contentious issues in the whole scheme of things if we find that there was indeed a concluded contract. As correctly pointed by the learned counsel for the second respondent, the appellants had sought an order of specific performance 'of the agreement' to award the billboard privatisation scheme as a concession to the appellants.

[20] What amounts to a concluded contract is a matter of fact and law. The law is as prescribed in s 7(a) of the Contracts Act 1950 which reads as follows:

> 7 Acceptance must be absolute
>
> In order to convert a proposal into a promise the acceptance must —
>
> (a) be absolute and unqualified;

[21] What s 7(a) says is simply this. For any concluded agreement to come into existence there must be a clear and definite offer by the proposer and an 'absolute and unqualified' acceptance of the same by the offeree. The phrase 'absolute and unqualified' is critical in that any acceptance coupled with any condition can never be a 'absolute and unqualified' acceptance. It must be absolute in that all terms set out in the offer must be accepted. It must be unqualified in that acceptance attached with condition is a qualified acceptance. Once such conditional acceptance is on the negotiating table so to speak, the parties are simply back to the negotiating mode as there is now a counter offer by the offeree which in effect rejects the proposal. Withdrawal of the conditional acceptance per se would not revive the original offer. Only an absolute and unqualified acceptance of the counter offer by the proposer will there be a concluded contract between the proposer and offeree.

[22] As to what should be the approach to employ in unraveling the factual matrix to determine whether parties had reached consensus ad idem on the terms, the Federal Court in *Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310; [2015] 8 CLJ 1068, reasoned that that question 'could only be gleaned from the mandate letter, the emails/letters and conduct of the parties' and 'not on the subjective mind, but upon a consideration of what was communicated between them by words or conduct ... from the perspective of the notional reasonable man'. In other words, the test is an objective one.

[23] A similar approach was in fact applied in an earlier Supreme Court decision in *Ayer Hitam Tin Dredging Malaysia Bhd v YC Chin Enterprises Sdn Bhd* [1994] 2 MLJ 754; [1994] 3 CLJ 133 where Edgar Joseph Jr SCJ opined as follows:

> The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding

A circumstances, and the object of the contract. In other words, in its task of ascertaining the intention of the parties, the Court will, generally speaking, apply an objective test, more particularly, it will ask itself, what would the intention of reasonable man be, if they were in the shoes of the parties to the alleged contract.

B **[24]** With the above guidelines at the foremost of our minds, we now apply the same to the factual matrix herein. Learned counsel for the appellants in advancing his contention that there is a concluded contract between the appellants and the second respondent relied in our view on the following events:

C (a) the appellants' proposal dated 14 December 2005 in which the following terms, in the words of the learned counsel, were offered:

(i) a concession was to be granted by MBPJ to Seni Jaya and Orion Mesra for exclusive rights to manage all outdoor advertising sites in Petaling Jaya, excluding sites within ROW (right of way) of the Sprint, LDP, NKVE and Federal Highways;

D

(ii) an undertaking was given by MBPJ not to issue or renew any licences to any other parties for sites built on privately owned land or buildings;

E

(iii) the concession period was for 15 years with an option to renew for five further years;

(iv) Package A was to consist of the 172 specially identified billboard panels identified by MBPJ in the Site List, which was annexed as Appendix 10 to Seni Jaya's proposal (Package A sites);

F

(v) on or before 1 January 2006 MBPJ was to deliver the 172 Packages A Sites to Seni Jaya and Onion Mesra;

(vi) Package B was to consist of all other outdoor advertising sites in Petaling Jaya (excluding the Package A Sites) amounting 450 sites (Package B sites);

G

(vii) on or before 1 January 2007, MBPJ was to deliver the 450 Package B Sites to Seni Jaya and Orion Mesra;

H

(viii) the consideration was to be as follows:

(1) to MBPJ, payment of the licence fees for all the Package A and Package B sites, on annual basis;

I

(2) to the Sports Club, a one time payment of RM320,000 in consideration for Package A (Package A initial payment);

(3) also to the Sports Club, an annual payment of RM1.78m for the 172 Package A Sites computed as follows (Package A annual payment); and

(4) annual payments to the sports club for all the Package B Sites at the same rates as in para (c) as applied for 172 Package A sites;

(b) MBPJ's letter of Seni Jaya's proposal agreed in principle dated 16 December 2005;

(c) Seni Jaya's payment to the sports club totaling RM2.1m and Orion Mesra also undertook to carry out all maintenance works in respect of the Package A and Package B sites, throughout the 15–20 years concession period;

(d) the board meeting of the second respondent dated 22 December 2005;

(e) confirmation letter dated 21 March 2006 by the second respondent; and

(f) meeting of councilors of the second respondent dated 31 May 2006.

LETTER DATED 16 DECEMBER 2005

[25] As much reliance is made on the letter of 16 December 2005 by the appellants, a detailed analysis of the same must be made by us and we do so by setting out the same in full here:

> Pengurusan dan Operasi Papan Iklan Luar (Outdoor Advertising) di kawasan MPPJ
>
> Dengan hormatnya saya merujuk kepada surat tuan bertarikh 14 Disember 2005 berkenaan perkara tersebut diatas. Pihak MPPJ Jaya *secara prinsipnya* bersetuju memberi konsesi kepada syarikat tuan di dalam pengurusan dan operasi papan iklan luar di kawasan MPPJ kecuali kawasan-kawasan ROW lebuhraya Sprint, LDP, NKVE dan lebuhraya persekutuan dan lain-lain tempat yang dipersetujui oleh kedua-dua pihak.
>
> 2. *Perkara-perkara penting dan utama yang dikemukakan oleh pihak tuan di dalam surat tersebut akan diteliti oleh pihak kami dan akan dibincangkan dengan pihak tuan secepat mungkin.*
>
> Sgd.
>
> Yang Dipertua
>
> Majlis Perbandara Petaling Jaya
>
> (Emphasis added.)

[26] Though the words 'agreed in principle' were used in the letter dated 16 December 2005, they must be considered in the context of the entire letter. The proposal made by the appellants was not short in details and it is glaring in the response made by the second respondent, there was no reference to any of the proposed terms. In fact, in the second paragraph of the letter, it states in no uncertain terms that important terms and conditions ('perkara-perkara penting dan utama') will be discussed between the respective parties. With

respect, how one can treat that as an absolute and unqualified acceptance is beyond us. It is at best a qualified or conditional acceptance which in law is in effect a rejection.

[27] Learned counsel for the appellants, however, submits that the factual matrix, despite the lack of a formal executed agreement, had given rise to a binding contract. With respect, we find no merit in such contention and our reasons are these. Firstly, the proposal submitted by the appellants envisaged a 15–20 years monopoly in the use of the numerous advertising sites in the city of Petaling Jaya which would involve matters such as concession payments, approvals from numerous regulatory bodies, location of advertisement sites, delivery dates and plus the fact that many of the sites of which the appellants are claiming exclusive or monopoly rights by the concession are sites claimed by licensed third parties. Surely the rights of these third parties must be settled or taken care of between the relevant third party and the second respondent before the second respondent can agree to anything. It is not insignificant that the proposed cl 5.1.6 of the draft agreement put forth by the appellant provides that the second respondent 'upon expiry of the Third Party Permits, not to extend or renew such Third Party Permits under any circumstances'. Such onerous term has great ramifications to the second respondent and we are sure that it had been fully advised on those ramifications which could include legal suits from the relevant third party or at best compensations to be paid to the relevant third party. No reasonable enterprise would agree to such onerous term unless and until the full ramifications are known to it. With respect, the appellants' solicitor's contention that all the terms had been agreed to by the second respondent is bereft of any evidence, written or otherwise. It is also bereft of any commercial sense.

[28] Secondly, there was in fact a proposed agreement between the appellants and the second respondent and that, in itself, as pointed out by learned counsel for the second respondent, ran into 37 pages and contained numerous terms of detailed and far-reaching effect. A cursory look at that document would show that the terms proposed are complex to say the least and would require well trained commercial legal adviser to give proper advice as it involved the capacity of the second respondent, being a statutory body, to enter into business relationship with commercial enterprises. This was correctly picked up by the legal department of MBPJ where its legal advisor at a council meeting dated 22 December 2005 expressed his reservation:

> iv. ... Penasihat Undang-undang Majlis memberi komen bahawa keputusan kepada Perkara 20.5 adalah bertentangan dengan undang-undang. MPPJ tidak boleh menswastakan tapak 172 kepada 2 syarikat dengan menandatangani perjanjian kerana MPPJ adalah bukan tuan punya tanah atas tapak iklan berkenaan, MPPJ tiada 'Locus Standi'.

[29] Thirdly, the second respondent is a statutory body and it is plain as day light that for the second respondent to enter any commercial transaction of such a nature, like any private commercial entity, it would require an appropriate approval in a form of minutes of council meetings. We see no such written approval by the second respondent. The lack of such written consent basically shows that it had not or could not agree to the proposal put forth by the appellants.

[30] Fourthly, simple common-sense dictates that no reasonable person or commercial enterprise would be bound by such a loose arrangement as that advanced by the appellants' counsel when the business relationship encompasses a monopoly of some 15 years of unlimited use of advertising sites and involves quite a substantial amount of monetary consideration.

[31] Fifthly, as rightly pointed out by learned counsel for the second respondent, if there was indeed a concluded contract there was no necessity for the first appellant by a letter dated 26 May 2006 to protest the failure of the second respondent to reply on the proposed changes. Such protestation simply infers that there was no concluded contract until a formal agreement was executed by respective parties.

[32] In regard to the payment of RM2.1m to the sports club by the appellants, it is a matter between the appellants and the sports club as we find no evidence to link that payment to the alleged concluded contract between the respective parties. At best, the payment was made on the hope that there will be a concluded contract between the appellant and the second respondent. Hope plus payments to a third party in the circumstances could not be equated to a concluded contract. again, if that payment is part of the consideration to the proposed agreement, surely mention must be made of that consideration in the proposed agreement sent to the second respondent to consider. It simply does not make sense not to mention that RM2.1m consideration in the proposed agreement. We agree with learned counsel for the second respondent that the appellants made the fatal risk in not naming the sports club as a party to the suit to advance their contention that the sports club is an agent to the second respondent.

[33] As we have found that there is no concluded contract, we do not find it necessary to deliberate on the leave questions. We are fully aware that the questions posed are questions where leave had been granted by this court. Be that as it may, this court continues to have the discretion whether to answer those leave questions especially when answering them becomes an academic exercise (see *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 MLJ 257; [2003] 3 CLJ 349).

A CONCLUSION

[34] What the High Court and the Court of Appeal had done was merely to apply the right law to the factual matrix to the same. From our analysis, no one can say that their conclusions were conclusions which no reasonable tribunal would arrive at. Their reasonings were premised on established evidence adduced in court and consistent with both common and commercial sense. What that simply means, no appellate intervention is warranted by this court.

[35] Accordingly, we dismiss the appeal with costs in the sum of RM50,000 subject to payment of allocator fees. We also order that deposit be returned to the appellants.

Appeal dismissed.

Reported by Ashok Kumar